STATEMENT OF THOMAS H. DUPREE JR.

Before the United States Senate Judiciary Committee

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Thank you for inviting me to testify today and to share my thoughts on the topics of Supreme Court ethics and disclosure requirements.

I am a partner at Gibson, Dunn & Crutcher and co-chair the firm's Appellate and Constitutional Law Practice group. The views I share today are my own. I served as Principal Deputy Assistant Attorney General under President George W. Bush and Attorney General Michael Mukasey. Between my work at the Justice Department and at Gibson Dunn, I have argued more than 100 appeals in the federal courts, including in all thirteen federal circuit courts of appeals, as well as the United States Supreme Court.

There are several bills under consideration that would impose a Code of Conduct on the Supreme Court. Today I will focus on Senate Bill 359—the Supreme Court Ethics, Recusal, and Transparency Act of 2023—but I will address the salient features of the other bills as necessary.

Senate Bill 359 would impose a host of new requirements on the Supreme Court, as well as on the parties who appear in the Court and on the lawyers who practice before the Court. Section 2 of the bill orders the Supreme Court to issue a

Code of Conduct governing the Justices and to establish procedures for disciplinary investigations of Justices; Sections 4 and 5 impose on Justices new recusal and disqualification requirements; and Sections 6 and 7 impose new disclosure requirements on party and amicus briefs filed in the Supreme Court or the courts of appeals.

Let me start with the imposition of a Code of Conduct. This is an extraordinary mandate that infringes on the separation of powers—a bedrock principle that underpins our constitutional democracy. Our founders well understood the importance of separating the legislative branch from the judicial branch. As the Supreme Court has explained, "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." [*Plaut v. Spendthrift Farm*, Inc., 514 U.S. 211, 219 (1995)] The lesson of this shared experience is reflected in the words of James Madison, who wrote in Federalist 47 that "the preservation of liberty requires that the three great departments of power should be separate and distinct."

Ordering the Justices to adopt a Code of Conduct offends the separation of powers. The bill intrudes upon the core function of a coordinate and co-equal

branch of government. It is the Supreme Court, not the Congress, that has the prerogative under our constitutional structure to decide whether to adopt a Code of Conduct that governs themselves. As Chief Justice Roberts has written, courts "require ample institutional independence" and "[t]he Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."

This bill—and in particular its provision directing the Justices to draft a Code of Conduct, put it out for public notice-and-comment, and then adopt it—seems to be animated by an assumption that the Supreme Court of the United States is no different than the Department of Agriculture, or any federal agency that can be commanded by Congress to engage in rulemaking. Suffice to say that is not how the Framers drew it up. The relationship the Constitution establishes between the Article I Congress and the Article III Supreme Court is one of co-equals; the judiciary is not an inferior branch.

The bill offends the separation of powers in other ways. It would compel speech by the Justices by requiring them to post ethics-related information on the Supreme Court website. It would require them to publicly disclose internal rules and guidance from the Counselor to the Chief Justice of the United States. And

perhaps most ominously, the bill would require the Court to establish procedures under which individuals may file complaints alleging that a Justice of the Supreme Court has violated the Code of Conduct—or any provision of federal law. They can also file complaints alleging that a Justice has engaged in conduct—on or off the bench, and apparently at any point in their lifetime—that the complainant believes may have "undermined the integrity of the Supreme Court of the United States." The complaints would then be referred to what the bill calls "judicial investigation panels," composed of circuit court judges, who would then sit in judgment of the accused Justice. If one were to try to design a scheme that would undermine Americans' faith in the legitimacy and integrity of the Supreme Court, these "judicial investigation panels" would be an excellent start.

Another bill, Senate Bill 325, entitled "The Supreme Court Ethics Act," charts a similar troubling course. It would task the Judicial Conference of the United States with issuing a Code of Conduct governing Supreme Court Justices. When he testified before Congress, Justice Kennedy described that very proposal as legally problematic and "structurally unprecedented" because it would empower the Judicial Confidence, a group composed of "district and circuit judges to make rules that supreme court judges have to follow." The bill would also create what it calls an "Ethics Investigations Counsel" charged with investigating Supreme Court Justices not just for violations of the Code of Conduct, but for *any* conduct alleged

to be "prejudicial to the ethical, effective, and expeditious administration of the business of the Supreme Court of the United States."

Another bill, entitled "The Supreme Court Code of Conduct Act," would similarly create a designated ethics officer who would "process complaints" that a Supreme Court Justice has violated the Code of Conduct or federal law, or has done something that the complainant believes to have been "prejudicial to the administration of justice." The designated officer would be required to publish the complaints against Justices on the Supreme Court's website.

Just as with the "judicial investigation panels," these proposals for an "Ethics Investigations Counsel" or a designated ethics officer would damage and debase the institution by encouraging frivolous and politically-motivated attacks on the Court's integrity. If you don't like the outcomes of particular cases, well then, attack the ethics of the Justices with whom you disagree and force them to post your accusations on their website.

Let me now turn back to Senate Bill 359 and focus on its provisions concerning the recusal and disqualification of Supreme Court Justices. Adopting these measures would open the door to a tidal wave of disqualification motions in virtually every important case. Round One in all the big-ticket constitutional cases would be litigation over which Justices are eligible to decide the case, and which

Justices must be disqualified. Here too, it is hard to imagine anything more corrosive to public faith in the Supreme Court than what would become routine volleys of motions alleging that various Justices are ethically compromised and must recuse because they accepted a meal from someone distantly connected to a case. As Justice Scalia once wrote in denying a request that he recuse, "While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor . . . ." [*Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 928 (2004) (Scalia, J., in chambers)]

The bill's provisions requiring enhanced disclosures from parties and amici pose their own distinct constitutional dangers. Section 6 would impose extreme and unnecessary disclosure requirements on those who file briefs in the Supreme Court. Section 7 would impose a host of additional disclosure requirements on those who file amicus briefs in the Supreme Court or in a federal court of appeals. In cases where the amicus is an organization, the amicus would need to disclose the identity of anyone who made a substantial contribution to the organization or to an affiliate of the organization.

The purpose of an amicus brief—literally a friend-of-the-court brief—is to assist the judges. A good amicus brief does not simply echo the parties' briefs but provides a different perspective, often one derived from the amicus's own experience. In some cases, an amicus brief will fully align with the positions of one of the parties, but in other cases, an amicus brief will stake out a middle ground or urge an outcome that neither of the parties have proposed.

The bill's disclosure requirements are unnecessary. The Supreme Court and the federal courts of appeals already have disclosure requirements that govern amicus briefs. If the Justices and judges on the Supreme Court and the federal courts of appeals believe that additional information would help them evaluate the arguments presented in an amicus brief, it is their prerogative to require that information.

These disclosure requirements would result in far fewer amicus briefs being filed. That in turn would result in the courts receiving far less information, and hearing from far fewer voices, when they decide cases.

Moreover, the disclosure requirements will chill and penalize constitutionally protected conduct. By requiring amici to disclose the identities of those who contribute to their organization, the bill would put a steep price on the exercise of First Amendment rights, including the right to free speech, the right to

assemble, and the right to petition the government. The bill tells those who want their voice to be heard in our federal courts, "You may speak—but only if you turn over your contributor list."

Allow me to close by saying that the provisions of the bills I have discussed today seem to be animated by a dark and distorted perception of our judicial branch—a perception that is fundamentally at odds with what I have seen in more than 20 years of practice in the Supreme Court and the courts of appeals. In my experience, speaking as someone who has argued in front of hundreds of federal judges throughout the country, our federal bench is populated by men and women of the highest integrity. Even when I disagree with the outcome in a particular case, I have never doubted for a moment that these are judges who are striving to do their absolute God-given best to faithfully interpret the laws and the Constitution of our great nation.

Thank you very much. I welcome your questions.